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## **FUNDAMENTAL RIGHTS AND JUDICIAL REVIEW: THE ZAMBIAN EXPERIENCE.**

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The subject of human rights never fails to excite the interest of lawyers and politicians. The topic is to the law what the theme of love is to literature and music. It is for that reason that most modern constitutions contain some statement concerning human rights. The *Zambian Constitution* adopted in 1964, like the *Zimbabwean* one of 1980, affirms human rights eloquently and in elaborate detail in a Chapter which comprises the nation's Bill of Rights.

This article is about the application of the *Zambian Bill of Rights* to real life by the Courts. In a wider sense it is also a comparative study of similar types of constitutional devices. The article was originally written several years ago during my days as an academic lawyer. It has been updated a few times up until 1981 when publication was expected but then became unavoidably delayed. Therefore I do not lay any claim to be making an up to date statement of *Zambian law* or any other law that is referred to. However I do believe that most of what is stated is still valid though not exhaustive. Perhaps the article will prove more valuable to the reader with a more universal interest in fundamental rights and the way they have been conceived and interpreted in various jurisdictions over the last century.

It is also this latter dimension which explains why an article on the *Zambian Constitution* should appear in the *Zimbabwean Law Review* and under my name in 1984. It should be obvious that I am not submitting this article in my present political capacity as a Minister nor indeed in my previous reincarnation as Minister of Justice and Constitutional Affairs. I do so purely out of a desire to share with those that have the time and inclination to read and reflect, the fruit of our research effort. I do so also on account of my abiding interest in the *Zambian law and constitution*, the area of study in which politicians must on pain of losing their jobs be parochial unless told to behave differently, scholars often have interests which range beyond national boundaries.

The freedom charter of the *Zambian people* is enshrined in Part III of the *Constitution*. In eighteen long articles the fundamental rights and freedoms of the individual are meticulously spelt out and closely qualified.

The introductory section summarises them as follows:

“Whereas every person in *Zambia* is entitled to fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour,

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creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following

- (a) life, liberty, security of person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation;

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".<sup>1</sup>

The general purpose of the Chapter is to define a certain area of human activity which shall, within limits, be sacrosanct and immune from legislative and executive encroachment and to constitute the courts, the custodians and umpires over that freedom.

Historically the *Zambian Bill of Rights* is a descendant of a similar bill in the *Northern Rhodesia Constitution of 1963* which was adopted almost intact into the *Independence Constitution of 1964*. Prior to that fundamental rights in this sense were as unknown to the territory as in the United Kingdom. In 1960 the Monckton Commission<sup>2</sup> recommended the introduction of bills of rights into the constitutions of the federated territories of British Central Africa. Bills of rights were subsequently written into the constitutions of Southern Rhodesia and Nyasaland. For Northern Rhodesia the fight for some guarantee of individual liberty was part and parcel of the struggle for independence. The United National Independence Party (UNIP) came out with its own Declaration of Human Rights as early as October, 1960. The party wanted the constitution of Northern Rhodesia to contain "fundamental safeguards guaranteeing the freedom of the individual and providing against abuse of power by the executive". The Declaration comprised 14 items including practically every freedom in the present constitution.<sup>3</sup>

The new clamour for and imperial approval of bills of rights in British Central Africa were not isolated events. The early 1960's as a whole is a period when bills of rights came unexpectedly into vogue in English legal thinking. English legal theorists had for long stubbornly resisted the influence of the French Revolution and American Constitution for their home and colonial constitutions. Even the atrocities of the two Great Wars of the 20th century which influenced many nations to adopt constitutional

1. Art 13 Constitution of Zambia, Act No. 27, 1973

2. Cmnd 1148-501, 1960

3. A copy of the full declaration can be found in Mulford: *The Northern Rhodesia General Election 1962*. OUP, London, (1964), p. 191.

guarantees over individual liberties, generally left English jurists unmoved and unimpressed. India might follow the principles of the Constitution of Eire, but neither was to be allowed to influence the constitutions of Britain's dependencies, for both republicanism and philosophical manifestos in legal documents with which the U.S.A., France, Eire and India were associated, stank in the nostrils of His Majesty's legal advisers. Even the international concern with individual liberty influenced by the Universal Declaration of Human Rights (1948) and the European Convention of Human Rights (1951) to which the United Kingdom was party had no immediate impact on English legal theory.

British and Commonwealth acceptance of Bills of Rights as domestic legal documents came suddenly after their adoption in the Nigerian and Sierra Leone constitution in 1959. From 1960 on most of Britain's dependencies, including the territories comprising the Central African Federation, were issued with constitutions containing similar justiciable bills of rights and these were invariably retained at independence.

Writing in 1964, Professor de Smith, observed the process of change in British attitudes to bills of rights as follows:

"We could be witnessing yet another manifestation of that familiar process in which the deplorable becomes recognised as the inevitable and is next applauded as desirable; or the unfolding of a wilderness of single instances; or the opening of a new chapter in the history of British political thought".<sup>4</sup>

Today it is possible to register more firmly that a transformation had indeed occurred in British legal philosophy. Modern Anglo-Saxon attitudes look much more favourably upon a foreign country that accepts a bill of rights than one which does not; British liberal conscience will be the first to express disapproval when an African country discards its constitution or suspends its bills of rights. Indeed powerful voices have recently been raised in favour of bills of rights even for the home constitution.<sup>5</sup>

Thus in the 1960's British jurisprudence came to accept the usefulness of bills of rights for foreign countries including former British colonies; since the seventies it has become less heretical to preach the virtues of judicially guaranteed fundamental rights for the United Kingdom,<sup>6</sup> and the next decade may well witness the introduction of a bill of rights into the home constitution.

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<sup>4</sup>. *The New Commonwealth and its Constitutions*: Stevens, London 1964 p. 163.

<sup>5</sup>. A.Lester: "Fundamental Rights in the United Kingdom: the Law and the British Constitution", *University of Pennsylvania Law Review*, Vol 125, No.2.1976, p. 337. Leslie Scarman: *English Law: The New Dimension*, Stevens, 1974. Lord Hailsham said that a Bill of Rights in the U.K. was desirable in order to restrain "socialist" legislation, *The Times* (London) 16,19 May 1975.

<sup>6</sup>. A.Lester, *op. cit.*

During the same period a lively debate on fundamental rights was in progress among the older members of the Commonwealth which like the United Kingdom had on the whole eschewed general guarantees of individual liberties. New Zealand introduced a bill of rights in August 1963; in some Australian states notably New South Wales and Queensland the adoption of comprehensive bills of rights became hot political issues. Perhaps the most important effort among the old Commonwealth countries was taken by the Diefenbaker Government in 1960 which enacted a bill of rights *eo nomine*, albeit in a qualified and unique form. The Canadian Bill of Rights enacted by the Dominion Parliament<sup>7</sup> in 1960 is (1) a statutory not a constitutional measure; (2) it is explicitly limited to federal matters; (3) it is not legally enforceable; and (4) it may be abrogated by a legislative measure which expressly states that the Act of the Parliament of Canada "shall operate not with standing the Canadian Bill of Rights". These are substantial qualifications which leave the bill with but few teeth. It merely states that all statutes, past and future, shall be so construed or applied as not to "abrogate, abridge, or infringe" the rights enumerated in the bill of rights. The actual list of rights enumerated comprises most of the rights commonly regarded as fundamental rights by most States in the world today. But its usefulness was not immediately apparent at the time of its enactment. An eminent constitutional authority stated that the bill is merely "admonitory, enunciating a rule of conduct for Parliament and a rule of interpretation for the Courts"<sup>8</sup> which might be used to promote civil liberties. Its function appeared to lie somewhere between that of the Indian Directive Principles and that of the Zambian legal rules which are justiciable.<sup>9</sup> However, in time even the Canadian Bill of Rights seems to have acquired greater legal significance than originally envisaged. It has been held to prevail over antecedent legislation discriminating against Red Indians.<sup>10</sup> Mr. Joseph Drybones, a Canadian Indian, was convicted for being "unlawfully intoxicated off reserve contrary to section 94 (b) of the Indian Act". Canadians of other races were free to get drunk outside reserves. The Supreme Court of Canada was prepared to entertain the argument that this law prescribed a burden on Indians from which other Canadians were exempt and thus contravened the "equality before the law" clause section 1 (b) of the Canadian Bill of Rights and ruled that the law was inoperative. The general rule that emerged was that in case of an irreconcilable conflict between another statute and the bill of rights the latter must prevail.<sup>11</sup> The Canadian Bill of Rights had clearly waxed stronger from its tender beginnings.

7. 8 & 9 Eliz. 2, C. 44 (1960).

8. Bora Laski: *The Canadian Bill of Rights*, (1962) 11 I.C.L.Q. p 519 at p 527. See also *R v Gonzales* (1962) 32 D.L.R. (2d) 290; *Robertson & Rosetanni v R* [1963] S.C.R. 651.

9. For a full discussion of the Canadian bill see de Smith, *op cit.* pp. 205-210.

10. *R v Drybones*, [1970] S.C.R. 282, For an interesting discussion of the implications of this case see W.S. Tarnopolsky: *The Canadian Bill of Rights from Diefenbaker to Drybones*, *McGill Law Journal*, Vol. 17, 1971, p 437.

11. The rule had been adumbrated in Mr Justice Cartwright's dissenting judgement in *Regina v Gonzales*, (1962) 32 D.L.R. (2nd) at 662.

### Some Afro-Asian Objections

It must not be supposed that in the 1960's all the new states of the Commonwealth were suddenly issued with bills of rights drafted at Westminster. Most did accept bills but there were some significant exceptions among the new African and Asian rulers, notably the Presidential regimes of Ghana, Tanganyika, Malawi and Pakistan. Military regimes which now dominate the African political scene have been less outspoken about their rejection of codes on fundamental rights than the presidents they replaced. However, in practice the military are no less impatient with justiciable bills of rights as they are with constitutional government generally. The problem of human rights becomes submerged in the wider one of constitutionalism. For some explanation of the rejection of bills of rights by some of the new states it is necessary to turn to the presidential regimes mentioned above.

Ghana attained independent statehood in 1957 and for the following ten years its government policies and attitudes were moulded in the image of Dr. Kwame Nkrumah. Nkrumahism came to mean many things. African liberation, anti-imperialism, anti-colonialism, African personality, socialism; to many Ghanaians it also meant personal rule and preventive detention. Kwame Nkrumah took delight in wielding concentrated power and brooked no opposition, political or judicial. It was therefore axiomatic that justiciable bills of rights found no place in his scheme of things. His admiration of Nehru did not lead him to adopting an Indian style declaration of fundamental rights for Ghanaians in the independence constitution. Instead the Republican Constitution of 1960 omitted all mention of bills of rights. Ghanaians had to be content with a presidential undertaking to adhere to certain fundamental principles of conduct. A bold attempt to transform the presidential declaration into a justiciable "Bill of Rights" was categorically shot down by the Supreme Court which stated

"In our view the declaration merely represents the goals to which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts . . . The declarations, however, impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts".<sup>12</sup>

In the case of Ghana the people could derive little consolation from the court's pronouncement given the reality of a one party state and Kwame Nkrumah's personal control of the ruling party and elections thereunder.

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<sup>12</sup> *Re Akoto* [1961] G.L.R. 523

What has been said of Ghana can with minor modifications be said of other presidential regimes as well.

Pakistan adopted a bill of rights after independence, modelled on that of India. However, these guarantees were soon jettisoned together with the constitution. The military rulers who took over power in rapid succession in the wake of a series of *coup d'états* had as little regard for fundamental human rights as they had for the constitutions they overthrew. The main objection against bills of rights stemmed from the fear of the rulers that justiciable guarantees of human rights would unduly limit executive action. General Ayub Khan had occasion to denounce justiciable bills of rights saying they gave unfair advantage to wealthy citizens and are liable to hold up the implementation of vital developmental programmes.<sup>13</sup>

The ruling party in Tanzania has consistently rejected the very concept of fundamental human rights with cynical disdain. Bills of rights had been excluded from both the independence and Republican Constitutions of Tanzania because they were regarded as the kind of luxury which the people could hardly afford to entertain.<sup>14</sup> Later the Tanzanian Commission for the establishment of a one party state also dismissed the idea of judicial review on the footing that such a power would increase the chances of conflict between the courts, the executive and the legislature. The Commission Report stated that "decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate".<sup>15</sup> A former Attorney-General<sup>16</sup> of the Tanzanian Government recently attributed his country's inflexible opposition to the concept of a court-enforced bill of rights to his government's distrust of Britain's *bona fides* in proposing to prescribe a bill of rights for independent Tanzania when she had ruled the territory without such a device and did not have one in her own constitution. There was suspicion in the early days that Britain was seeking to continue to control Tanzania policy through the judges who were of necessity going to be British in origin for some time after independence. Perhaps another explanation for the opposition at the time of independence was the tremendous influence exerted by Nkrumah's Ghana on East African, particularly Tanganyikan, political thinking.

Malawi had an enforceable bill of rights up to 1964. The present republican constitution merely states that "the Government and people of Malawi shall continue to recognise the sanctity of the personal liberty as enshrined in the United Nations Universal Declaration of Human Rights and of adherence to the Law of Nations"<sup>17</sup> Some of these principles on which Government "shall be founded" are specifically spelt out e.g. that no person *should* be deprived of his property without the payment of fair

13. *The Constitution: The President Addresses the Nation* (1962), pp. 8-9.

14. Proposals of the Tanganyika Government for a Republic, Govt. Pap. No. 1 1962, 6.

15. Commission Report p. 31.

16. Mark D. Bomani's remarks during "Seminar on Human Rights, their Protection and the Rule of Law in a One Party State", International Commission of Jurists Dar es Salaam, Sept. 22-29, 1976.

17. Constitution of Malawi, s 2



compensation, that "all persons regardless of colour, race or creed *should* enjoy equal rights and freedoms etc." The constitution goes on to state that no law or action done under a law *shall* be held to be inconsistent with or in contravention of the declaration if the law is "reasonably required in the interests of defence, public safety, public order or the national economy". At one glance it is clear that this declaration of principles contains an extraordinary indulgence of loose drafting which obscurs its meaning and legal import. It is at once mandatory and admonitory in its terms and the last provision added by an amendment of 1968, seems to invite judicial review of legislation as well as executive action, which the declaration, read as a whole, clearly negates. The document certainly does not contain justiciable rights. And even if it were a bill of rights there would be hardly anything to enforce since the exception clause is so wide. What action could fail to pass under defence, safety, order or national economy?

### General Arguments against Bills of Rights

1. Today most states in the world accept, or do not oppose, the codification of individual rights in some document which will act as a standard and guide for the government and protection of the citizen. These documents are sometimes called "directive principles of state policy", "principles of law making", or "normative assertions". Such documents lay down general norms but are not enforceable legal rules. The best example of such documents on the level of international relations is afforded by the generalities in the provisions of the Universal Declaration of Human Rights which represent no more than a "common standard of achievement". For that reason the vast majority of U.N. members voted for or adhered to it.<sup>18</sup> Rather fewer states have gone further to accept international conventions constituting rules of strict law which confer rights on individual citizens and which they can enforce against the state. Examples of such legally binding documents at international law are the European Convention of Human Rights and the U.N. Covenant on Civil and Political Rights and the Covenant on Economic Social and Cultural Rights which were signed in 1966 by less than a third of the U.N. members (38 and 39 respectively) and took ten years to attract enough ratifications for the Covenants to enter into force.<sup>19</sup>

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18. The Universal Declaration of Human Rights is a resolution passed by the U.N. General Assembly on December 10, 1948 by forty eight votes to nil and eight abstenations (Three USSR votes, Czechoslovakia, Poland, Saudi Arabia and South Africa). The Declaration and other U.N. actions on human rights are based on the U.N. Charter especially Arts. 55 and 56 which impose on the legal obligations on members to promote "Universal respect for and observance of, human rights and fundamental freedoms." The Declaration itself is not a legally binding agreement but has had a considerable impact as well as on the bills of right of a number of states.

19. Up to now the two Covenants have 44 and 46 contracting parties respectively including the U.K. and the U.S.S.R.

However the acceptance by states of international instruments on human rights does not always correspond with the states' willingness to adopt or to retain justiciable bills of rights in their domestic law. The outstanding example, is of course, the United Kingdom where the government's readiness to embrace international obligations has been matched by continued resistance to bills of rights at home. True the old anti-bill-of-rights xenophobia has lost some of its force even in England, but a degree of cynicism persists about the efficacy of such documents. In Africa and other developing countries the doubts and silent reservations are promoted by the frequency with which constitutions have been overthrown or constitutional guarantees of fundamental rights suspended. It is therefore still relevant to review some of the more general conceptual arguments against bills of rights.

It is easy enough to understand attitudes and tastes of this kind but it is not so easy to argue rationally against them. The major fallacy of the English traditional attitude which some English lawyers now see is one of muddled overgeneralisation. Englishmen may have been well governed without bills of rights but not necessarily because of that fact; some countries with bills of rights may have been misgoverned but it hardly makes sense to attribute the misgovernment to the presence of documents guaranteeing human rights.

A second fallacy of the Anglo-Saxon utilitarians is the attempt to draw a dichotomous distinction between constitutional and statutory provisions from the point of view of their efficacy. Both are but categories of laws and all depend for their usefulness on the existence of a political will to enforce them. Constitutional and statutory provisions are not mutually exclusive as Dr. Wheare suggests. In fact the ideal constitution would seem to be one which declares and guarantees as many basic national issues, including human rights, as the people desire and which is serviced by a legal system which enforces those rights. The advocates of bills of rights are not asking for empty declarations, on the contrary, they want nations to adopt constitutional bills of rights as integral parts of their legal systems.

1. The traditional hostility to legal documents on human rights can be explained on several grounds. Historically it was based on an over-reaction to the ideas of the French Revolution. Jeremy Bentham may have been right in castigating a badly drafted French Declaration of the Rights of Man which did nothing to alleviate the excesses of the Jacobin reign of terror. He was wrong in lifting his strictures to the level of a universal condemnation of all fundamental rights as "rhetorical nonsense - nonsense upon stilts".<sup>20</sup> Bentham's followers, comprising the vast majority of English constitutional lawyers after him, developed his criticisms into a general distaste for philosophical manifestos in legal documents - an eccentric constitutional tradition which tallied rather conveniently with their domestic political and legal experience. In England the only check on the

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20. "Anarchical Fallacies", in *Works* (ed Bowring) Vol.2 pp. 497, 501.

power of Parliament to pass legislation derogating against the most basic liberties of the individual is a political one - the famed temper of the British people as expressed in their Parliament. This temper has worked so well over the years that generations of eminent apologists had no hesitation in extolling this political legal arrangement as the best possible one for all nations. Englishmen, said Sir Ivor Jennings, "merely have liberty according to law . . . (but) do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man".<sup>21</sup> Dicey had stated earlier that the Habeas Corpus Acts "are for practical purposes, worth a hundred articles guaranteeing individual liberty".<sup>22</sup> Dr. Wheare only grudgingly conceded that a bill of rights might have a place in a constitution but, said he, "the ideal constitution then would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights".<sup>23</sup> More recently Professor Lloyd was really reciting the familiar English credo when he said that "from the point of view of legal technique we already possess a better method tried and tested over generations, for establishing, delimiting, and enforcing human rights, than the proposed substitute of a pre-determined Bill of Rights under judicial control."<sup>23a</sup>

There is a third fallacy in the arguments of the English utilitarian writers. They say declarations failed in France but statutory and common law remedies succeeded in England; *ergo* constitutional declarations are bad and statutory and common law remedies are good. Even if the premiss was true, which it is not, the conclusion is obviously a *non sequitur*. This is immediately apparent if we reverse the equation. A France armed with the common law and statutes given the history and social conditions engendered by the *ancien régime*, would have fared no better under the Jacobin dictatorship. True the Declaration of the Rights of Man did not and could not save Marie Antoinette's neck from the guillotine; but then it cannot be seriously suggested that the Habeas Corpus Acts or any other English legal remedy could have altered her fate any more than they had saved the neck of Charles I or the throne of James II of England. We have numerous recent cases, from colonial Kenya and Rhodesia to independent Nigeria and Uganda, of atrocities and inhumanities perpetrated in spite of the existence of the *habeas corpus* remedy or constitutional guarantees of fundamental rights. The lesson of history seems to be that occasionally there are some volcanic eruptions from the belly of society which appear to defy any manner of legal ordering. The law, whether contained in bills of rights or in individual statutory provisions or the judge's rules, is never of itself sufficient to prevent social and political upheavals. It is disingenuous, to say the least, to attribute other people's troubles to the presence of bills of rights or one's own social stability to their absence. Moreover, to base one's whole constitutional theory on the experience of a single nation, one's own, and to ignore the accumulated wisdom of the rest of mankind smacks of the kind of legal nationalism which does little to develop a universal constitutional jurisprudence.

21. *The Approach to Self-Government*, (1956) p. 20

22. *The Law and the Constitution*, 10 ed (1960) p. 199

23. *Modern Constitutions*, O.U.P. London 1966. p. 49

23a. "Do We Need a Bill of Rights?" 39 *Mod. Law Review*, 1976. p. 125.

Some modern English jurists have begun to question the supposed superior virtues of the British way of protecting civil liberties as not necessarily the best for all times even for the United Kingdom. The legal foundations of English civil liberties were designed for a nineteenth century type of British society whose insularity, affluence and stability were buttressed by an economy built on the resources of a vast empire and the industrial revolution at home, a society held together by a powerful army and administered by a small band of like-minded civil servants drawn from the same social and educational background as the politicians and the judges; a society which preached the philosophy of *laissez-faire* and social Darwinism disapproving of state intervention on behalf of the underprivileged but which insisted on state protection of property and contract, a society which had not yet experienced the full weight of unionised working class and mass political parties; a society in which civil rights especially for women and workers were regarded more as political privileges which might be conceded if they were prepared to go out into the streets and demonstrate for them, than legal rights to be claimed in a court of law; a society which was moreover conscious that worse conditions for the underprivileged prevailed in most other European countries.

In the second half of the twentieth century these conditions have been transformed, in particular there is a far greater popular awareness of civil rights and a demand for their protection. The old machinery of protection may no longer be the best for the job today. It has been suggested that a bill of rights with properly enforced guarantees against religious discrimination might have averted the recent tribulations in Northern Ireland, and that an American type of bill of rights which has a reasonably effective machinery of judicial enforcement would improve the English law relating to police power of interrogation, search and seizure, obscene publications, and passports.<sup>24</sup>

The more beneficial course of action would seem to be for the Westminster Parliament to enact for the United Kingdom the European Convention for the Protection of Rights and Fundamental Freedoms which is already enforceable in the United Kingdom as in fourteen other European states. The European Convention and its supplementary Protocols comprise some twenty articles containing a list of well defined rights which the parties to the Convention undertook to secure for every person within their jurisdiction. Since 1966 individual petitioners have been able to invoke Convention procedures alleging violation of their rights by the United Kingdom which also accepts the compulsory jurisdiction of the European Court. The European Commission upheld petitions by British citizens of Asian origin<sup>25</sup> on the basis that the immigration procedures imposed on them by the British Government violated the right of security of the person and respect of family life (Art. 5), and constituted degrading treatment (Art.3) and discrimination on grounds of race (Art. 14). Similarly certain police methods of interrogation in Northern Ireland and the use of the birch in the Isle of Man have been declared to be

24. S.A. de Smith, *Constitutional and Administrative Law*, 3rd Ed. p 440.

25. *The Times* (London) May 29, 1974.

a violation of human rights. In these cases there was probably no remedy under municipal law. It is apparent that the United Kingdom had accepted for its nationals a sophisticated set of rules for the protection of human rights which is enforceable in Europe; enacting these rules in a domestic statute would enable United Kingdom citizens to enforce their rights in English courts. The advantages would be to remove any doubt or conflict about the applicability of the Convention rights in United Kingdom law and reduce the chances of United Kingdom practices which appear perfectly legal at home being pronounced illegal in Strasbourg. It is unimportant that such a bill should be formally entrenched; the European Communities Act 1972 can in theory be amended or repealed like any other act but cannot in fact be repealed without breaching the Treaty of Rome. But like the European Communities Act a statute enacting the European Convention into a United Kingdom Bill of Rights would have to be given testing powers against other laws either as strong as the United States Bill of Rights or in an attenuated form like the Canadian Bill of Rights. The European Convention is already acting as a negative check on United Kingdom legislation and executive practice in much the same way as the Canadian Bill does on Federal legislation.<sup>26</sup> In reality the application of the Convention in the United Kingdom has taken much of the sting from the virulence of the traditionalists' argument against bills of rights.

2. Secondly, the English had a belief that rights and freedoms of man cannot usefully be defined, let alone guaranteed. Sir Isaiah Berlin in an Inaugural Lecture at Oxford, on October 31, 1958, stated:

"Almost every moralist in human history has praised freedom. Like happiness and goodness, like nature and reality, the meaning of this term is so porous that there is little interpretation that it seems to be able to resist".<sup>27</sup>

Professor Wheare adduced a further difficulty in the way of definition, that liberty means different things to different people, and to the same people, and to the same people at different times. He further argued pragmatically, in line with most English jurists, that no constitution can concede absolute rights, and that rights must of necessity be qualified whether or not you have a bill of rights. He expressed scepticism as to whether a bill made any worthwhile difference. He said no realistic attempt to define the rights of a citizen can exclude qualifications, and he asked, what of substance remained when these were given full effect. He cited Article 43 of the first Constitution of Eire as a classical example of giving a right with one hand and taking it away with the other. It began:

"The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods'. It continued with a clause calculated to lift up the heart of the most old-

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<sup>26</sup>. See *ante*

<sup>27</sup>. *Two Concepts of Liberty*, Oxford (1958), p 6.

fashioned capitalist: 'The State accordingly guarantees to pass no law attempting to abolish the rights of private ownership or the general right to transfer, bequeath and inherit property'. But the next two sentences are likely to disappoint: 'The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good'. The Constitution of Yugoslavia goes hardly further than this".<sup>28</sup>

The difficulties of devising bills of rights may have been overstated by Professor Wheare. It is true that a constitutional guarantee which simply said "every citizen shall have freedom of movement" would raise justifiable suspicion. Equally an article which guaranteed that "no person shall be deprived of his personal liberty except in accordance with the law" might be said to provide an illusory protection. However, these are pitfalls, which most modern draftsmen can avoid. Indeed the articles of the neo-Nigerian Bills of Rights such as that of the Republic of Zambia do leave a measure of protection for the individual. There is no need to draft bills in the form of Article 43 of the Eire Constitution. Moreover there are bills of rights e.g. that of the United States Constitution which are revered by their citizens as providing protection of substance. Scholars should not pursue labyrinths of logic while ignoring existing reality.

Nevertheless the manner in which many governments particularly in Africa have in practice taken advantage of the exception clauses would tend to support Professor Wheare's scepticism. When one examines the manner in which detention laws have in fact been applied in Ghana, Tanzania, Zambia and Kenya, one is at a loss to pick which countries have bills and which have not.

3. Thirdly it is sometimes said that a bill of rights enforceable by the courts is a reactionary and undemocratic device which makes the courts the final arbiters of legality and policy instead of the elected representatives of the people. In England where the doctrine of the sovereignty of Parliament was canonised by Dicey and other writers such an argument has been accepted without further question; it has also appealed to other people of a liberal democratic persuasion. Judges are appointed and not elected, and by their training and tradition they tend to breed a conservative frame of mind. Why then, the argument goes, must they be given the power to review acts of parliament or of the executive? In this way judicial reviews and bills of rights are assailable as offending both against the sovereignty of parliament and the sovereignty of the people.

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<sup>28</sup> K.C. Wheare, *Modern Constitutions*, OUP London (1966) pp 40-44.

The answer to this objection is that the testing right given to the courts is the most practical and fairest way of enforcing bills of rights. Parliament itself is ill equipped to provide remedies to an individual whose rights have been infringed. A separate agency could of course be endowed with the task of reviewing legislative and executive action against a bill of rights instead of the courts. But if the new institution is to apply strict procedures to ensure justice and impartiality we would simply end up with another court even if a reformed one. In any case the process could still be objected to as questioning parliamentary and popular sovereignty. The critics therefore tend to demand nothing less than the removal of the whole concept of the enforceability of human rights. But what use are rights which a citizen cannot enforce?

The argument that judicial or any other review of laws passed by legislature is thwarting the will of the people is itself incorrect. If a constitution includes the power of judicial review it expresses the supreme will of the people acting solemnly in the people's sovereign constituent capacity. In adopting the constitutions the people would place limitations on their parliaments as elected from time to time to legislate according to the constitution and by the same act they empower the courts to review any disputed legislation. Seen in this light judicial review is but a method of fulfilling the will of the people which, where there is a bill of rights, also protects their rights.

4. Another argument, often advanced by Marxists and other opponents of liberal democracy, is that judicial review limits executive action and hampers economic development which is perceived as the most needed commodity in new nations. It is said - rather crudely-that a hungry man requires food not a bill of rights, and that freedom of speech is no consolation to a man without a job. It is argued further that bills of rights are not only useless but that they may do positive harm. They permit one rich person to hold up government measures designed to wipe out hunger and unemployment.

In reality there is no conflict between rapid development and justiciable fundamental rights. The assumption of those who defend constitutional guarantees of human rights is that the individual member of society should not be sacrificed on the altar of economic development. Indeed it can be argued that greater and better development can be achieved only if the people collectively and individually are well treated.

5. One jurisprudential objection against bills of rights says that they introduce uncertainties in the law. The main argument here is that where the courts are endowed with the guardianship of the constitution then no law passed by the legislature is certain to be valid until it is challenged in a private litigation and the law is upheld by the highest court in the state. Enactments which can be nullified by a private litigant years after they have been on the statute book and probably enforced on many other citizens who were not disposed to bring litigation must surely throw the law into an abyss of uncertainty and confusion. Moreover, decisions of

lower courts upholding legislation can be appealed against and can be overturned, even the highest court itself can go back on its own previous decisions, rendering the state of uncertainty truly unending.

These are without doubt weighty objections to which there are no easy answers. The element of uncertainty is inherent in any system of judicial review. It is however, to be remembered that the argument is not limited to judicial review where there is a bill of rights but to every case of adjudication. In any case the suggested alternatives are either to have no bills of rights at all or to have bills which are not enforceable. This is hardly acceptable if one otherwise recognises bills of rights as valuable bulwarks against tyranny and despotism. To sacrifice the protection of the fundamental rights of the individual in the pursuit of legal certainty is to throw away substance and opt for the shadow, for "certainty is a matter of degree and absolute certainty in law is an illusion".<sup>29</sup> Uncertainty attributed to bills of rights can be minimised by empowering a tribunal or the courts to give an advisory opinion on any Bill before it is passed, as in the *Zambian Constitution*<sup>30</sup> or immediately after the enactment of legislation. The latter method was suggested but rejected in *Zambia*.<sup>31</sup>

6. Yet another objection is that bills of rights are a privilege for the wealthy citizens who can afford the cost of litigation and are a goldmine for lawyers. This is really an objection to the whole judicial process not just in relation to fundamental rights. The remedy is to simplify the process of litigation and to provide adequate legal aid for poor people seeking to enforce their rights.

7. It is sometimes argued that bills of rights are useless for in time of crises such as war or national emergency they are apt to be suspended or abrogated. Bills of rights will not therefore protect civil liberties at the very occasions when those liberties are most likely to be invaded. Related to this point is the argument that bills of rights, however well entrenched, are in the last resort not immune from legislative encroachment. They can be qualified and emptied of any meaningful content; they can be suspended or abolished as the legislature feels fit. They only appear to work when the government has no need to encroach on the rights of the individual. In short, bills of rights add nothing to protect the individual against the government.

This objection goes to the root of the question whether bills of rights have any value. To this we shall revert in subsequent pages.

For the moment it must suffice to say that it is true bills of rights like any other parts of the constitution are not immune from legislative amendment or suspension particularly in crisis situation. Bills of rights

<sup>29</sup> D.V. Cowen: *The Foundations of Freedom*, OUP London, 1961 p 153.

<sup>30</sup> *Constitution of Zambia 1973*, Art 28.

<sup>31</sup> *Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia*, Government Printer, Lusaka, 1971. cf. Government Paper No. 1 of 1972.



are not meant to be an impregnable silo from which to confront the legislature and government. Their guarantees are necessarily qualified and may be overridden in the interests of security, for instance, in war. The protection bills of rights may provide in times of peace is still valuable. Even if the protection is suspended in a crisis it is better this is done consciously after the public have been informed than that this should happen unnoticed and as matter of habit.

8. Lastly it is sometimes said that judicial review of fundamental rights leads to confrontations on matters of policy between the government and the courts, and that since the courts are likely to emerge the losers in what is in reality a tussle for power, the judiciary would eventually be discredited.

To this argument we can only respond that if the government and the courts understand the function of bills of rights and their own respective roles, there need be no confrontations; if there are, the loser in any particular case need not be discredited. No serious confrontations have occurred in Zambia, for example, although the country had operated a bill of rights since independence. Among the older states with bills of rights the United States had had some confrontations but the courts there have not been discredited.

### **The Value of Bills of Rights**

When attempting to plead the case for Bills of Rights it is necessary, though it is by no means an easy task, to distinguish substance from form. Some of the opposing arguments we have reviewed show that those who disparage Bill of Rights most vociferously do not always specify whether it is the content of civil liberties they oppose or the form of enactment, or merely the drafting techniques thereof. The Marxist opponents fall into the first category: they prefer to protect economic and social rights such as the right to just conditions of work, trade unions, social security, education and not what they regard as bourgeois freedoms, such as freedom of conscience, speech, association and of owning property. The English utilitarians on the other hand were not opposing the legal protection of any of these items of human rights, they only preferred to see that protection not in one neat constitutional document, but in the ordinary law of the land and the common decency of parliamentarians. Yet another group of critics oppose either loosely worded guarantees which in fact give no protection at all or those so narrowly framed as to prevent desirable legislative initiatives. The arguments we shall adduce here are not intended to convert those who object to human rights on ideological grounds. Belief cannot be altered by an appeal to reason. If one's concept of political society is Hobbesian or Hegelian, then man has no rights antecedent to the state, and any talk of fundamental rights protected against violation by the state is a contradiction in terms.

The best known modern examples of states in which a person was regarded as no more than a cog in the state machine are of course Nazi Germany and Fascist Italy. But more recent examples of state disregard

of human rights abound in the practice if not the theory of many governments. The only difference is that today few governments will admit that they deny their citizens the right to life, fair trial, freedom from arbitrary arrest freedom of speech, association and most of the freedoms commonly found in Bills of Rights, even if in practice they do not protect these. The idea of human rights has permeated the international climate and taken hold of the aspirations of people throughout the world to the extent that it is no longer safe for rulers to openly reject the content of human rights even if they may reject Bills of Rights as a method of protecting those rights.

The first advantage of a Bill of Rights is that it is a basic legal document which defines and guarantees certain items of civil liberties which a particular society believes should be protected from encroachment by the state. It lays down minimum standards of protection for every person within the jurisdiction of a state. On the part of the state the adoption of a Bill of Rights implies an acceptance of the idea of limited government and a rejection of absolute discretion and a recognition that all persons are to be treated equally and with respect not only as a matter of good statesmanship but as a matter of legal obligation. If one believes that state power ought to be controlled and that absolute power corrupts, it is not difficult to see that an effective Bill of Rights can be a very important bulwark against dictatorship.

A Bill of Rights is primarily a political document, a solemn covenant between the government and its people comparable to the Magna Carta 1215 and the English Bill of Rights 1689; it is a simple acceptance of the concept of limited government and the foundation of liberty and democracy. While it is possible to have a democracy without a Bill of Rights, the existence of an effective Bill is the surest indication of the absence of tyranny. No one claims that a Bill of Rights by itself can prevent the emergence of tyranny; all that can be said is that the work of a dictator is made much more difficult. As the report of the Minorities Commission on Nigeria put it,

"a government determined to abandon democratic courses will find ways of violating them. But they (Bills of Rights) are of a great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individuals."<sup>33</sup>

By definition, law cannot guarantee against illegality, a Bill of Right is unlikely to stop a determined dictator any more than a determined burglar will be stopped by the criminal law, but in both cases the citizen is protected by the knowledge that the dictator and the burglar are acting illegally and, if caught, will be punished.

Secondly, a Bill of Rights may have a great educative value both on the citizens and on the state. It becomes a common charter, in understanding about people's rights. There can be no doubt that people

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<sup>33</sup> Cmd 505 (1958), 97.

in countries with bills of rights tend to be more conscious of their rights than those who have to rely on the common law or individual statutes. If we compare the United Kingdom position with the United States of America we shall find that in the latter civil liberties are a much more lively subject, not only among lawyers but in the education system, in employment, housing, the army, and in pretty well every aspect of life. The high degree of consciousness of human rights among Americans is very largely attributable to the presence of a fairly effective Bill of Rights. In a young state emerging from decades of colonial suppression the majority of the people will have acquired the habit of submissiveness to government officials which may continue after independence is won by the educated elites. A Bill of Rights which is taught in schools and enforced by the courts may be one way of restoring people's pride in themselves and creating a vigorous state of free people. The more people know and value their rights, the more difficult it will be for a tyrant to abolish them.

Education is a two way process. A Bill of Rights can educate the government as well as the administrators. It sets a standard to guide the legislature, draftsmen, and the individual civil servant who deals with the public. In time the whole state machinery gets into the habit of respecting the people they administer and in that way the people's rights become more securely guaranteed.

Thirdly, the adoption of a Bill of Rights may in fact be good politics. A Bill of Rights tends to allay the fears of minority groups as well as those generally regarded as being at the receiving end of government. In spite of all the cynicism often voiced about Bills of Rights, it is amazing how they do in fact inspire confidence in politically disadvantaged groups. Many of the Commonwealth Bills of Rights have their origin in the desire to allay somebody's fears. In most cases the departing colonial power would wish its citizens remaining in the new state to feel that they will not be arbitrarily harassed or dispossessed by the incoming regime. In Zambia the United Kingdom wished to reassure the mining companies and other foreign investors that they would not arbitrarily be dispossessed. The Zambian government gave them that reassurance partly by adopting a constitution containing an elaborate Bill of Rights which also helped to allay the fears of Zambia's opposition groups. Looking back it cannot be said that Zambia has lost anything by giving that assurance. If anything, Zambians have probably gained. Desirable measures have been implemented without provoking unnecessary disaffection. For example, in 1964 the government acquired mineral royalties and in 1969 nationalised the mining industry without provoking the kind of hostility by the mining companies as could have wrecked the industry. In Zimbabwe, the former British Colony of Southern Rhodesia, the inclusion of a Bill of Rights was regarded as an important protection for the rights of the white minority which helped to induce them to accept the independence constitution under a black government.<sup>34</sup>

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<sup>34</sup>. The other elements of protection of minority rights were separate representation for whites in Parliament and virtual unamendability of certain areas of the constitution for ten or seven years.

Fourthly, justiciable bills of rights can provide an effective shield with which a citizen can defend himself against excessive official action. Not only do bills have a preventive potential, but, when a breach does occur, they have a remedial function as well. Bills often provide a cause of action where none may exist under the common law or individual statutes. They are institution for ventilating grievances as well as for redressing rights infringed and fortunes ruined by official interference. The number of cases in which people who had no cause of action under British law but who succeeded in obtaining a remedy on the basis of the European Convention of Human Rights<sup>35</sup> is a telling illustration of the deficiencies of the common law and the possible value of a bill of rights. Even where a bill is heavily qualified, there usually remains an area of protection which may make the bill well worth having.

Fifthly, the proliferation of international conventions on the subject of human rights indicates the general concern of mankind about safeguarding people's liberties as well as a belief that bills of rights are important legal devices for achieving that purpose.

Moreover, most states have undertaken international obligation to respect human rights; the best way of implementing those pledges is to enact similar provisions in their domestic law in the same way as the provisions of the Geneva Convention on Diplomatic Relations are always enacted in domestic legislation. The great advantage of enacting a bill of rights is that it makes a conflict between a states international obligations and its home laws, such as we have seen in Britain, less likely. In relation to the United Kingdom, Sir Leslie Scarman strongly advocated the adoption of a bill of rights which he said was "desirable — perhaps inevitable if the United Kingdom is fully to honour its international obligations and if its law is to meet the demands of a rising public opinion."<sup>36</sup> This remark is even more relevant to developing countries which may have no strong tradition for respecting human rights.

### **The Zambian Bill of Rights**

In Zambia the Bill of Rights, apart from the original articles. 18, 23 and 25 and subject to observations made below, has been on the whole respected. The body of constitutional cases decided so far is small and successful invocations of the Bill against the State few. But all of them are leading cases regarded as such by the courts. government and people.

There can be no doubt that the Zambian Bill of Rights has already made a tremendous impact on the people which the government cannot easily ignore. The whole exercise of introducing a one party system in Zambia and the reaction of the people has borne this contention out. The new political order does mean a curtailment of some of the freedoms hitherto enjoyed under the Bill of Rights which the government has effected

35. See *ante* p. 107.

36. *English Law — The New Dimension*, Stevens, London 1974.

through Parliament's powers of amending the Constitution. Nevertheless, the President being sensitive to people's acquired tastes for individual liberties, set up a National Commission to consider the constitutional changes necessary for the implementation of the one party system, adding that "the fundamental rights and freedoms of the individual shall be protected as now provided under Chapter III of the Constitution of the Republic of Zambia."<sup>37</sup> The Commission found this directive rather contradictory since in a one party state, there could be no right to form other political associations or express opinions about them. Apart from those necessary changes, the Commission recommended and the government accepted that other freedoms remain unaltered. The Commission reported that many petitioners made strong recommendations in favour of the right of personal liberty and the right to freedom as enshrined in the Constitution. Furthermore, a battle to halt the introduction of the one party system was fought and lost in the courts.<sup>38</sup>

When a similar exercise took place in Tanganyika — a country which had never had a bill of rights — there was no comparable clamour for the fundamental freedoms of the individuals. The *Zambian Bill* has endeared itself to a people that is to a large extent legally unsophisticated. We shall discuss below the *Zambian Bill* in closer detail, together with the relevant cases that have so far come before the courts.

The *Zambian Bill of Rights*, like others emanating from the Commonwealth Relations Office, consists of two parts — a declaratory section and a detailed list of individual guarantees with their qualifications. The courts have construed each guarantee as being re-inforced by the preamble article 13.

Secondly, the guarantees protect individual rather than community rights. The experiments with guarantees of minority rights for groups of people during the protectorate era, included devices like the qualified franchise, the Federal African Affairs Board, and reserved seats for racial groups, were all abandoned at independence. The philosophy of African Nationalism was that all these devices were unnecessary. Give the individual a vote and protect his rights, it was argued, and you have given the minority groups the best possible protection. The United National Independence Party Declaration of Fundamental Human Rights of October 1960 stated:

"These fundamental laws will not alone safeguard the members of the minority groups but all the people of the country. They are not a concession to any one group or a community but rather an expression of UNIP's belief in the dignity and freedom of the individual and in the principles of justice and charity to all."

37. Report of the National Commission on the Establishment of a One Party Participatory Democracy in Zambia, Government Printer, Lusaka, 1972, p. 9.

38. *Nkumbuta v. Attorney-General*, [1972] S J Z 40

Thirdly, the Bill of Rights protects the rights of "every person in Zambia." It does not discriminate as to race, colour, political view or religion. It is not limited to citizens as in some articles of the Indian Bill.<sup>39</sup>

Fourthly, as suggested in Art 13, the rights in the Bill may be classified as (1) personal, (2) political (3) and possessory. They may also be grouped as positive and negative rights. However, no analytical benefit can be derived from those descriptions and no further reference to these classifications need be made.

The principles of derogation are fairly common to all rights. All rights and freedoms are guaranteed subject to the respect for the rights of others and for the public interest, and subject to any specific limitations in the individual provision. When the Republic is at war or is under a declaration of emergency any measures may be taken to deal with the situation even if they otherwise abrogate the fundamental rights provisions provided they are reasonably justifiable for the purpose. Indeed, any permitted derogation must be "reasonably required"<sup>40</sup> for the purpose. Secondly, a derogation must not be impugned as "not reasonably justifiable in a democratic society". This vague phrase has seen much judicial interpretation. It includes illusive factors which tempt judges to impose an interpretation based on their own political philosophy and social scale of values. In the *Kachasu* case,<sup>41</sup> "democratic society" was equated with "the democratic society which exists here in Zambia." That definition cannot be the one intended by the framers of the constitution. It is not difficult to picture a situation where Zambia is ruled by a military junta without elections and the rulers claiming that they are running a democracy. The criterion cannot be any existing political set up but must be objective. *Kachasu* was openly abandoned on this point in *Patel v. A.G.* where Mr. Justice Magnus stated that in spite of some distinction between standards of democracy in developed and developing societies "there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."<sup>42</sup>

## THE INDIVIDUAL PROVISIONS

### THE RIGHT TO LIFE

"No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal

39. Constitution of India Arts. 15, 16, 19, 29, 30. *Gopalan v. State of Madras* [1950] S C J 174

40. Art 26 "Public interest" includes defence, public safety, public order, public morality or public health.

41. In *Kachasu v. A.G.* [1967] Z R 145 at 165 it was stated that the expression does not mean "necessarily required" or even "urgently required". In England the positive explanation was given as "a genuine, present need, something more than desire, although something less than absolute necessity." See *Gonsales v. Thompson* [1922] C P C 477

42. [1968] Z R 99 at 128

offence under the law in force in Zambia of which he has been convicted.”<sup>43</sup>

This section is little more than a codification of the common law of homicide. The qualifications are really the common law defences to that crime. A person’s constitutional right to life is not infringed if he dies as the result of a lawful act of war or as a result of the use of reasonable force (a) in the defence of another person or property, (b) in order to effect a lawful arrest or prevent the escape of a person from lawful arrest or detention, (c) for the purpose of suppressing a riot, insurrection or mutiny, or (d) to prevent the commission by that person of a criminal offence.<sup>44</sup>

### *PERSONAL LIBERTY*<sup>45</sup>

“No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases . . .

- (a) in the execution of a sentence or order of court or a lawful arrest;
- (b) for preventing the spread of a contagious disease;
- (c) for the care and treatment of persons reasonably suspected to be of unsound mind, alcoholics, drug addicts, or vagrants;
- (d) for the sake of preventing unlawful entry into Zambia or for the purpose of a lawful removal of a person from Zambia;
- (e) for the purpose of enforcing a lawful restriction or detention order.

These exceptions must be read in conjunction with the general powers of derogation in an emergency or under the security laws of the Republic.<sup>46</sup> They all add up to a formidable subtraction on the guarantee of personal liberty.

The procedural safeguards e.g., that a person arrested or detained must be given reasons for his arrest or detention, that he shall be brought before a court without undue delay, are standard in common law jurisdictions. They are discussed more fully below.

Special safeguards with regard to detention under emergency or other security measures are contained in Article 27 of the constitution and may be enumerated in their sequence. When a person is detained he must be furnished within fourteen days with a written and detailed statement in

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<sup>43.</sup> Art 14 (1).

<sup>44.</sup> Art 14 (2).

<sup>45.</sup> Art 15

<sup>46.</sup> See Article 30

a language he understands and containing the grounds upon which he is detained. Within one month of his detention the particulars of the provision of the law under which he is held must be published in the gazette.

After one year from the date of detention and thereafter within intervals of one year and if the detainee so requests, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice who is or is qualified to be a judge of the High Court. The person detained must be given reasonable facilities to consult a legal representative of his own choice at his own expense for the purpose of making representation to the tribunal or else he can appear in person. The reviewing tribunal may make recommendations on the necessity or expediency of continuing the detention to the authority, normally the President, that ordered the detention. The detaining authority is not obliged to act in accordance with the tribunal's recommendations.

Any person in Zambia is in addition protected from illegal detention by the writ of *habeas corpus*. The writ of *habeas corpus* will not be granted to a person serving a sentence imposed by a competent court. A person illegally detained may have a remedy in tort for assault or false imprisonment.<sup>47</sup> A person whose liberty may be threatened by an authority or inferior court may have recourse to the High Court for an injunction, or for the orders of prohibition or *certiorari*.

### ***FREEDOM FROM SLAVERY, FORCED LABOUR AND TORTURE***

Article 16 of the constitutions prohibits the subjection of any person to slavery or to forced labour. The expression "forced labour" does not include labour required by a sentence or order of court, labour reasonably required for the maintenance of a person under lawful detention, labour required by the duties of a member of the police or the armed forces, or labour that may be required during war of emergency. The last exception comes very close to removing the whole guarantee. "Forced labour" does not include "labour reasonably required as part of reasonably and normal communal or other civic obligations." What other forced labour imposed by an authority could not pass as communally or civically required?

Article 17 protects the individual from torture, and inhuman and degrading punishment or treatment unless it was authorised by law. (In the then Southern Rhodesia the Appellate Division held that the mandatory death sentence under the Law and Order (Maintenance) Act 1960 s.33A was not "inhuman and degrading" and that those words related to types or methods of punishment, not to its severity or appropriateness.<sup>48</sup> In a later case the same court held that excessive delay

<sup>47</sup>. *Attorney-General v Mumba* [1974] ZR 218 *Chimba & others v Attorney-General* [1972] Z R 165

<sup>48</sup>. *Gundu and Sambo v Hayward and Bosman*- Judgement No AD 97/65



in hanging a person sentenced to death for his part in a Zimbabwe African National Union campaign in which a Rhodesian Front chairman was killed was not inhuman treatment or punishment.)<sup>49</sup>

### *THE RIGHT TO OWN PROPERTY*

No provision of the Constitution has caused so much controversy in Zambia as Article 18 which deals with the right to private property. It was the target of attack by all the political parties during the dispute over the ownership of the mineral royalties immediately before independence. The government threatened to repeal the article by referendum. It was finally amended in 1969 after a referendum in such a way as to allow government take-over of the land and the mines without having to pay excessive compensation.

The Article now states that no property shall be compulsorily taken by the State unless the taking or acquisition is necessary or expedient in the public interest subject to compensation determined by Parliament or subject to no compensation at all. Where compensation is granted the person entitled is permitted to remit out of Zambia the whole amount, or part of it after tax deductions subject to reasonable restrictions and regulations.<sup>50</sup>

The exceptions to the guarantee of property are numerous. Property may be compulsorily acquired without the protection of Article 18 (1) if the action is contained in a law providing

- i. for the satisfaction of a tax, rate or due,
- ii. a penalty imposed by law,
- iii. in satisfaction of a debt under a lease, mortgage or contract,
- iv. in execution of a judgement of a court,
- v. where it is necessary to do so in the interest of the health of people, animals or plants.
- vi. for so long only as may be necessary for the purpose of examination of inspection or improvement of the property.

These exceptions may be negated in so far as any provision containing them may be shown not to be reasonably justifiable in a democratic society.

There is another group of exceptional conditions in which property may be compulsorily acquired without the protection of subsection (1). Unlike the exceptions enumerated above, these are not even qualified by the necessity to show that the provision containing them is reasonable. The property may be taken outright where it is

- i. enemy property,
- ii. the property of a deceased person or a person of unsound mind, or a minor, for the purpose of its administration for

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<sup>49</sup>. *Dhlamini & Others v. Carter & Bosman* 1968 (2) SA 445

<sup>50</sup>. Constitution (Amendment) Act, No. 5 of 1969, Art 3. The original provision required prompt payment of adequate compensation which could be determined by a court in case of a dispute.

- the benefit of the person beneficially entitled,
- iii. the property of a declared bankrupt or a body corporate in liquidation for the benefit of creditors and other persons beneficially entitled,
- iv. property subject to a trust for the purpose of vesting it in the trustees.

The apparently numerous exceptions exist for the most part in other countries as well. They do not empty the guarantee of its essence but mainly repeat the common law position. Like with other fundamental rights the right to provide compensation now remains only at the mercy of the Legislature, which can pass any law for the acquisition of property with or without compensation provided it is for a public interest.

The provision received judicial interpretation in *Patel v. Attorney General*.<sup>51</sup> Patel was charged with two offences under the Exchange Control Act <sup>52</sup> and the regulations made under it (i) for doing an act preparatory to the making of payment outside Zambia and (ii) attempting to export currency. Customs officers had subjected Mr Patel's postal correspondence to search and had seized some bank notes and papers in evidence. Patel challenged the action of the officers on three constitutional grounds which were referred to the High Court. Did the opening, examination and seizure of the postal articles constitute a contravention

- (1) of the applicant's right to privacy of property guaranteed by Article 19, or
- (2) his freedom of expression guaranteed by Article 22, or
- (3) his right to protection from deprivations of property as guaranteed by Article 18?

On the right to property guaranteed by Article 18, Mr Justice Magnus held that the applicant's property had been compulsorily taken possession of but the exchange control came within the accepted derogation in s. 18 (1) (a) (ii) i.e. it was expedient to secure the development of the nation's financial resources for a purpose beneficial to the community. Furthermore the taking possession of the articles would still be saved by Article 18 (4) i.e. that it was temporary, "for the purpose of any examination, investigation, trial or inquiry". Finally, retention of property pending trial had not been and could not be shown to be unreasonable or unjustifiable in a democratic society.

The court rejected the argument that the regulations could be justified on the grounds that they were expedient in the interests of public security. It could conceivably happen that complete financial anarchy might so weaken the economy that internal disaffection might be caused leading to rioting and civil disturbance. So might widespread unemployment caused, say by over population. So might prolonged drought which disrupted agricultural production . . . None of these would, however, have

51. [1968] Z R 99

52. Cap 276.

the quality of proximateness which would justify involving this exception.”<sup>53</sup>

### PROTECTION OF PRIVACY OF HOME AND OTHER PROPERTY

“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others of his premises.”<sup>54</sup>

What is guaranteed here is privacy not only of one's home, but one's premises which could include shops and factories, and other property in the absence of consent.

There are the usual exceptions in the public interest, for the protection of the rights of others, inspection by public authorities, or for the sake of enforcing a court order. The law under which this derogation is made must be “reasonably required”, not “necessary or expedient” as in Article 18. It must again be reasonably justifiable in a democratic society.

In *Patel v. Attorney General*<sup>55</sup> it was held that the opening and examination of mail was *prima facie* a breach of the right guaranteed by Article 19 (1) but this was saved because it was reasonably required for the purpose of the scheme of exchange control justifiable under Article 18. It was also held that the search and examination of mail without warrant was justifiable in a democratic society because mail was something in transit which required some degree of haste, and illicit dealings in currency were analogous to trafficking in contraband. But a law which gave officials *carte blanche* powers of search at their own discretion without a warrant would not be reasonable in a democratic society.<sup>56</sup>

### RIGHT TO PROTECTION OF THE LAW

Article 20 contains procedural safeguards for persons accused of criminal offences.

“If any person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”<sup>57</sup>

Subsections 2 to 11 inclusive contain a list of presumptions and procedural safeguards already known to the common law *e.g.* the presumption of the accused's innocence until conviction; the accused's right to be informed with reasonable speed and in a language he understands, of the nature of the offence he is charged with; his right to be given adequate time and facilities to prepare his defence; his right to defend himself in court

<sup>53.</sup> At 32

<sup>54.</sup> Art 19

<sup>55.</sup> [1968] Z R 99

<sup>56.</sup> *Ibid* at 131 *per* Magnus J

<sup>57.</sup> Art 20 (1).

personally "or, at his own expense, by a legal representative of his own choice"; the right to examine the prosecution's witnesses; the right to an interpreter where necessary; the right to refuse to give evidence at his own trial; the right to be tried in a court held in public.

The qualifications to these guarantees are not many or unusual. Thus, in certain cases trials may be held *in camera*, legal representation may be removed before a subordinate court for an offence under African customary law, and a detained person tried for an offence committed against a law regulating the discipline of detainees may not be permitted legal representation of his choice or a right to cross examine the prosecution witnesses.

Only subsection (2) (d) dealing with the right of a person to be defended, "at his own expense, by a legal representative of his own choice" has come up for decision before the courts. In *Patel v. Attorney General*,<sup>58</sup> Mr Somabhai Bhullabhai Patel was charged with official corruption contrary to s. 348 (2) of the Penal Code and with the contravention of regulation 9 of the Exchange Control Regulations. He instructed his Zambian solicitor to brief Mr Thomas Kellock, a barrister resident in England but qualified to practise in Zambia. Mr Kellock came to Zambia but was informed that the Immigration Department refused him a work permit, hence he could not defend his client. Mr Patel challenged this refusal on the ground that it contravened his constitutional right to be represented by a legal representative of his own choice. The decision of the court turned on the meaning of the words "legal representative" and on whether Mr. Kellock was in fact prevented from defending his client.

Skinner C J found on the evidence that Mr Kellock's name was on the Roll of Practitioners and had a practising certificate and hence was entitled to appear before the courts.<sup>59</sup> Also he was not under any legal disability to exercise his profession in Zambia. He held, following Nigerian and Indian cases, that a person is "entitled to practise in Zambia" when he has a right of audience by virtue of registration and in addition is under no legal disability. On the second point he held that the relationship of client-solicitor, or barrister is not one of employer — employee. Mr. Kellock did not require a work permit. Hence he was not prevented from practising.

Consequently Mr Patel's right to counsel of his choice was not infringed. The government was obviously determined that Mr Kellock be not allowed to defend Mr Patel. Mr Kellock was declared a prohibited immigrant before he could appear in court.

In *Awolowo v. Federal Minister of Internal Affairs*<sup>60</sup> an English Q.C. was prevented from defending a Nigerian client because the minister

58. [1969] Z R 97

59. Legal Practitioners Ordinance s. 22 (Legal Practitioners Act 1973)

60. [1962] L L R 177

refused him entry into the country. The court held that the defendant's right to counsel of his choice was not violated for the section meant legal representative not under a disability of any kind.

### ***FREEDOM OF CONSCIENCE***

The Constitution in effect provides for a secular state in which religious freedom is guaranteed subject to the usual exceptions. Article 21 Provides:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and . . . freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

Except with his consent (or if he is a minor, the consent of his guardian) no person attending any place of education shall be required to receive religious instruction, or to take part in or attend religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than this own.”<sup>61</sup>

The section further provides that no religious community or denomination may be prevented from including religion in the education it provides. And no one may be compelled to take an oath contrary to his religious beliefs.

The qualification to the guarantee of religious liberty is once again quite comprehensive. Any of the things forbidden under the first four subsections given above may be done if the state can show that it is reasonably required.

“in the interests of defence, public safety, public morality or public order, public health; or

for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion, unless the complainant can show that it is not reasonably justifiable in a democratic society”.

As Blagden C J observed in the *Kachasu* case “these provisions may sound a trifle involved but the meaning and intent of them are clear.”<sup>62</sup> They introduce the right to freedom of conscience, thought and religion subject to restraints imposed by a law satisfying certain conditions. The practical

<sup>61.</sup> Art 21 (1)-(3)

<sup>62.</sup> [1967] Z R 145 at 161.

effect of these provisions is to reproduce the common law position on religious liberty in England minus the established church. The English law was stated by a great authority in the following terms:

“Save in so far as positive law may otherwise provide, the civil law (as opposed to ecclesiastical law) recognises and has always recognised the right of all to follow the dictates of their consciences in the religious opinions which they hold.”<sup>63</sup>

In *R v de Tager*<sup>64</sup> freedom of conscience was recognised, as part of the English law which was received as the law of Zambia. Legislative control of religious matters was underlined particularly in the case of politico-religious societies like the Watch-Tower Bible Tract Society.

In *Kachasu v. Attorney-General*<sup>65</sup> the present provisions received close judicial interpretation. Faliya Kachasu was a school girl brought up as a Jehovah's Witness. Her religion taught that it was sinful to sing hymns except to Jehovah. She and her father as believers regarded the singing of the National Anthem and saluting the National Flag as idolatry. They regarded these as religious ceremonies or observances contrary to their beliefs. Hence Feliya Kachasu declined to participate in these at school. She was suspended from attending classes in accordance with the provision of the Education (Primary and Secondary Schools) Regulations, 1966<sup>66</sup> pending an undertaking by her to comply with the school directives. The regulation required pupils at Government or aided schools to sing the national anthem and salute the National Flag on certain occasions.

Miss Kachasu applied to the High Court for an order that her suspension was unlawful, that she should be readmitted to classes, and that she be excused on religious grounds from saluting the Flag and singing the Anthem on three grounds:

- (a) that the suspension constituted an interference with her freedom of conscience, thought and religion as provided in Chapter III of the Constitution;
- (b) that the regulations are invalid, null and void because they were *ultra vires* s. 12 of the principal act and were in conflict with Article 21 of the Constitution;
- (c) that “for the purposes of Article 21 of the Constitution the test as to what constitutes a religious ceremony observance or instruction is subjective and not objective.”

Thus the court had to decide whether Article 28 of the Constitution also gave it jurisdiction to entertain issues other than constitutional issues, whether Regulations 25 and 31 were *intra vires* the Education Act 1966 and whether Articles 13 and 21 of the Constitution were contravened. It was held that:-

63. Halsbury: *Laws of England* Vol. XI para. 711; see also *Hawkes v. Moxey* [1917] 80 L J (K B) 504; *Flint v. Courthorpe* (1918) 87 L J (K B) 504

64. [1935] L R of N R 13

65. [1967] Z R 145

66. Regulation 25.

1. Although Article 28 of the Constitution confers a special jurisdiction from which the court must not stray, collateral issues connected with a constitutional issue such as in this case may be determined together.
2. Regulations 25 and 31 were *intra vires* the Educational Act 1966.
3. Where a religious opinion is in question a subjective test is applied. But whether a particular ceremony or observance is religious or not must be determined objectively.

Accordingly notwithstanding the views of the applicant, the singing of the Anthem and saluting of the flag were, objectively, not religious ceremonies or observances.

The suspension of Miss Kachasu was a hindrance to her fundamental right to free conscience, thought and religion under Article 21 (II) (2) of the Constitution. She was in effect being coerced into singing the National Anthem against her religious beliefs. However, this hindrance was reasonably justifiable in a democratic society; and reasonably required in the interests of national defence and for the purpose of protecting the rights and freedoms of other persons.

The *Kachasu* case is important not only because of the issues it decided but also because it reveals perhaps more than any other case the methods and approach of the courts in interpreting Chapter III. In the instant case the decision that the derogation from the guarantee of freedom of conscience was saved by the exigencies of public security was reached by a tortuous route. Counsel for the applicant had submitted that he could not see how exempting a few little children from saluting the flag and singing the National Anthem could possibly imperil the state or other people. The Chief Justice admitted that this was a powerful argument with which he was in sympathy. But he finally accepted the Attorney-General's arguments that the ceremonies were intended to foster national unity which "is the basis of national security" on which the very freedoms of Chapter III depend.

"National Security is thus paramount not only in the interests of the state but also in the interests of each individual member of the State, and measures designed to achieve and maintain that security must come first; and subject to the provisions of the constitution, must override, if need be, the interests of individuals and of minorities with which they conflict."<sup>67</sup>

The fact is that it is very difficult for an individual ever to challenge successfully any measure which the authorities claim is in favour of public security.

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<sup>67</sup>. [1967] Z R 145 at 164

Secondly, the court gave full force to the presumption "*omnia presumuntur rite esse acta*" with regard to statutes and ministerial acts.<sup>68</sup> This leaves a heavy burden on the applicant to prove the contrary.<sup>69</sup> He has to show that he has been "hindered" in the exercise of his religious rights; further, he must show that this hindrance is not saved under the section.

### FREEDOM OF EXPRESSION

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom of interference with his correspondence."<sup>70</sup>

The permitted derogation must be reasonably required in the public interest, for the purpose of protecting other people's reputations, and other rights or restrictions imposed on public officers. The exceptions are fortified by the law of defamation and libel, obscene publications and sedition. In *Chitambala and Others v R*<sup>71</sup> the appellants unsuccessfully appealed against conviction for conspiracy to publish a document with a seditious intention. A seditious intention was defined as an intention to excite the inhabitants of the territory "to attempt to procure the alteration otherwise than by lawful means of any matter in the territory as by law established." In *Patel v Attorney-General*<sup>72</sup> the court held that the opening, examination or seizure of postal articles containing currency note and wrappers marked with pencilled crosses were not correspondence. If they were, Article 22 would have been violated and the opening of the packets unlawful.

In the Nigerian case *DPP v Obi*<sup>73</sup> a law under which a man was convicted of sedition for publishing the words "Down with the enemies of the people, exploiters of the weak and oppressors of the poor" was held to be consistent with the constitutional guarantee of freedom of expression on the basis that it was reasonably justifiable in a democratic society to take reasonable precautions by prohibiting acts which if unchecked might indirectly lead to public disorder. This decision, if followed in Zambia, would narrow guarantee to a degree that was probably not originally intended.

68. *Ibid* at 162 See also *Arzika v Governor, Northern Region* [1961] A N L R 379 per Bate J at 382.

69. *Cheranci v Cheranci* [1961] A N L R 24

70. Art. 22 (1)

71. [1961] S J N R 9

72. [1968] Z R 99 at 132

73. [1961]. All N L R 186 cf. the Southern Rhodesia case *Mukahlera v R*. 1961 R & N 872 where an accused was convicted for telling a meeting not to worry the police because they were "small boys". See also *Haddon v R* A D 106/65.



**FREEDOM OF ASSEMBLY AND ASSOCIATION**

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.”<sup>74</sup>

The freedom guaranteed may be abrogated by law reasonably required in the interest of public security, health or morality, or the rights and freedoms of others or a law that imposes restrictions on public officers or that regulates the trade unions. Any of the exceptions must be reasonably justifiable in a democratic society.

Article 23 has not yet received judicial consideration under the Independence Constitution. Organisations have been banned or their activities restricted under the Preservation of Public Security Ordinance. There are also restrictions under the Penal Code on matters relating to criminal conspiracy, unlawful assemblies, riots *etc.* Restrictive or regulatory laws are also common *e.g.* the laws regulating the formation registration and operation of companies, trade unions and co-operatives.

All this has been done within the ambit of the exceptions to the guarantee but does not render the article nugatory.

The President, for example, is able to ban any organisation in Zambia temporarily or permanently but he could not prohibit the formation of another organisation. Thus, the introduction of a one-party system in 1973 required the prior amendment of Article 23. In *Nkumbula v Attorney-General*<sup>75</sup> the High Court considered whether the proposed introduction of a one party state contravened the freedom of association which is guaranteed by the Constitution. The court held that the proposal was not unconstitutional provided that its effectuation was preceded by an appropriate constitutional amendment.

**FREEDOM OF MOVEMENT**

Article 24 Provides:

“No person shall be deprived of his freedom of movement and for purpose of this article the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.”

The object of this guarantee is to remove all restraints on the movement of citizens of Zambia within the Republic. Herein lies the distinction of

<sup>74</sup> Art. 23 (1)

<sup>75</sup> [1972] Z R III

this section from Article 15 which guarantees personal liberty. A person whose freedom is restricted under either article may have his case reviewed by a tribunal.<sup>76</sup> The chairman of the tribunal must be a person who is or is qualified to be a judge of the High Court.

Like other freedoms, the freedom of movement in Zambia is also qualified. Thus the article does not protect a person from lawful detention or from a law imposing a reasonably required restriction in the public interest (defence, safety, order, morality or public health), a law restricting the movement of public officers, or the removal from Zambia of non-citizens.<sup>77</sup> Thus the President issued special regulations restricting the movement of foreign diplomats to a radius of twenty miles from Lusaka without infringing the article<sup>78</sup>. In two cases involving British subjects of long residence in Zambia, it was held that they had "no right under the constitution to liberty of movement"<sup>79</sup> but only, under the Immigration Act 1954, a non-prohibited immigrant status.

### *PROTECTION FROM DISCRIMINATION*

"No law shall make any provision that is discriminatory either of itself or in its effect.

No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority".<sup>80</sup>

The expression "discriminatory" is defined as affording different treatment to persons attributable wholly or mainly to their differences in race, tribe, place of origin, political opinion, colour or creed, whereby the person complaining has suffered a disability or restriction not applicable to others of a different category.

The guarantee is followed by a list of important exceptions. In the first place the section only applies to citizens of Zambia, not to all persons in Zambia. It does not apply to laws for the appropriation of the general revenues of the Republic, or to laws pertaining to matters of personal law e.g. adoption, marriage, divorce, burial, or to the applications of African customary law to particular tribes or to any other special treatment which is reasonably justifiable in a democratic society.<sup>81</sup> Secondly, discriminatory legislation is permissible if it makes reasonable provisions laying down the qualifications for public or local government officers.<sup>82</sup> Thirdly, the article does not protect anybody from discrimination by laws which were in force on October 24 1964, or to any amendments of such laws.<sup>83</sup> The area of legalised discrimination is thus quite wide.

76. Art 24 and Art 27 (1) (d)

77. Art 24 (2); *Chipango v A-G* [1970] S J Z 179; *Radebe v The People* [1972] Z R 4.

78. *Southern Africa*, 26 March 1965

79. *A G v. Thixton* [1967] S J Z 1; *Paton v A G* [1969] S J Z 10 at 27.

80. Art. 25 (1) (2)

81. Art. 25 (4)

82. Art. 25 (9)

83. Art 25 (4) (d) read together with the constitutions of Zambia Act (1973) s 6.

However, in the present political situation in Zambia it is not likely that there can be much discriminatory legislation or practice on racial grounds in view of the official policy of the government. Since pre-independence discriminatory legislation was mainly against Africans who are now controlling the government, it can always be redressed by repealing the offending provisions. The section could become important if more people invoked it with respect to discriminations on political or tribal grounds.

That the protection from discrimination is not rendered wholly otiose by the exceptions was demonstrated in *Chilufya v. The City Council of Kitwe*.<sup>84</sup> Mr Adam Chilufya, a member and former Parliamentary candidate of the African National Congress was prohibited by a resolution of the Kitwe City Council from carrying on trading business which he had done peacefully and successfully for twenty three years in Kitwe markets. Since the election campaign of 1966 his stall had on various occasions been picketted, boycotted and damaged by UNIP supporters. The reasons for the City Council's action given in the mayor's affidavit was that Mr. Chilufya "was so unpopular in the market that his presence therein constituted a security risk in relation to the efficient administration of the market . . . such as to endanger the property of the defendant and also his own person." Chilufya challenged the resolution on the grounds that it was *ultra vires* and unconstitutional.

Justice Mallon held the resolution of the City Council terminating Chilufya's trading licence was *ultra vires* on two grounds:

- (a) It was unreasonable, unfair and contrary to the principles of natural justice.
- (b) It was a breach of the plaintiff's constitutional rights under Articles 13 and 25 of the Constitution of Zambia. The City Council "treated him in a discriminatory manner because of his political opinions, in the performances of their functions as public authority."<sup>85</sup>

## THE SCOPE OF JUDICIAL REVIEW

The structure and general function of the courts as an institution of control on presidential governments have already been discussed. However, the courts also possess a specific regulatory role in respect of the fundamental rights of the individual.

In the first place, the Constitution makes provision for the review of a bill or statutory instrument which if enforced, would be inconsistent with the Bill of Rights.<sup>86</sup> Whenever such a complaint is made the Chief Justice appoints a tribunal of two persons who are or have been judges of the High Court to make a report on it. The request must be made by

<sup>84</sup>. [1967] Z R 115

<sup>85</sup>. *Ibid* at 78. See also [1967] Z R 115 at 128.

<sup>86</sup>. Art 28

not less than twenty-one members of the National Assembly by notice in writing. In the case of a Bill, the notice must reach the Speaker within three days after its final reading, in the case of a statutory instrument it must reach the authority making the instrument (usually the President) within fourteen days of its publication.<sup>87</sup> If the tribunal reports to the President and to the Speaker, that the Bill of statutory instrument would contravene any of the fundamental rights provisions, the President may withhold his assent from the bill<sup>88</sup> or annul the statutory instrument by order.<sup>89</sup> This potentially powerful instrument of review is weakened by the last provision that it is open to the President to ignore the recommendations of the tribunal. In any case, certain bills are excluded from the review process altogether viz. a Bill for the appropriation of the general revenues or a Bill expressly amending the Constitution.

Secondly, there is provision for the Chief Justice to appoint a similar tribunal to determine claims for legal aid made by persons intending to apply to the High Court in respect of contravention of the Bill of Rights. If the tribunal is satisfied that the applicant has reasonable grounds for bringing the petition and that he is unable to meet the legal costs on his own account or that the issues raised are of general public importance, it may grant him a legal aid certificate so that his costs will be paid from the general revenue.<sup>90</sup>

Thirdly, the actual machinery for the enforcement of the Bill of Rights is provided in Article 29 of the Constitution. A person who wants redress from the High Court in respect of the Bill must allege that any of its sections "has been, is being or is likely to be contravened in relation to him".<sup>91</sup> The High Court will then have power to hear and determine the issues raised as well as any collateral questions<sup>92</sup> and may make such orders, issue such writs and give such directions as it considers appropriate for the enforcement of the Bill of Rights. If a question of the contravention of the Bill arises in a subordinate court the magistrate presiding may refer the question to the High Court. The reference is obligatory if a party to the proceedings requests it.<sup>93</sup> Both sides to the proceedings may appeal against a decision of the High Court in a Chapter III case unless it was dismissed as frivolous and vexatious.<sup>94</sup>

The powers of review in Article 29 are in themselves an effective instrument to control legislature and executive action. They cannot be invoked against a Bill that has not yet become law or against actions of individuals.<sup>95</sup> Parliament may confer upon the High Court and the

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87. Art 28 (2) (a) & (b)

88. Art 79(3)

89. Art 81 (3)

90. Art 28 (4) (5)

91. Art 29 (1)

92. Art 29 (2)

93. Art 29 (3) *Patel v AG* [1968] Z R 99

94. Art 29 (4)

95. *Nkumbula v Attorney-General* [1972] Z R 111

Supreme Court more powers for enforcing the Bill of Rights.<sup>96</sup>

The record of the courts in enforcing the Bill of Rights has been on the whole timorous. After the *Thixton* and *Paton* cases the courts have sought to do justice to the individual but shied away from clearly defining the limits of executive action.

Thus in *Patel v Attorney-General* the court held that the petitioner's right to a legal representative of his choice was not infringed by a ministerial intention accompanied by an ineffective order designed to prevent Mr Kellock from defending his client. Within a week of the decision, Mr. Kellock was deported by an effective ministerial order.

In the *Kachasu* case the court came closer to abdicating jurisdiction to the executive and legislature. It defined the qualification of national security so widely and raised its paramountcy so high as to render any challenge to an executive claim of public security extremely arduous. The standard of public security in *Kachasu* was indirectly criticised but was not abandoned in a subsequent case. Its equation of "democratic society" with the existing Zambian system was also an interpretation favourable to executive liberty. Finally, Chief Justice Blagden stated that in interpreting the Bill of Rights, the courts "must give due weight to the opinion of the Legislature as expressed in a statute." He applied the presumption that the Legislature or a Minister acts constitutionally.<sup>97</sup> He further adopted the statement of Holines J. that "the legislature are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."<sup>98</sup>

The tendency therefore has been to adopt strict construction of the guarantees but a liberal construction of the derogations. The dictum of Blagden C.J. in *A.G. v Thirxton*<sup>99</sup> that "when fundamental rights of liberty are concerned, the courts should be slow to place an interpretation on the relevant provisions which would have the effect of denying these rights to the subject" has not guided the courts consistently in subsequent decisions.

The power of judicial review is of course wider than the Bill of Rights. It is the function of the courts to adjudicate on the validity of laws and executive actions with regard to the whole Constitution or enabling legislation.

The High Court also has reviewing powers with regard to inferior courts and administrative tribunals. They have power to grant the judicial remedies such as the orders of *certiorari*, *quo warranto*, prohibition, *mandamus* and injunctions. The application of this power of review was demonstrated in the pre-independence case of *The Queen v Attorney-*

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<sup>96</sup>. Art 29 (6)

<sup>97</sup>. At 14.

<sup>98</sup>. *Missouri Kansas & Texas Railroad v May* 194 U S 267

<sup>99</sup>. [1967] S J Z 1 •

*General, Ex Parte Allen*.<sup>100</sup> Kenneth Allen was a senior superintendent of prisons in charge at Bwana Mkumbwa during the Federation. The Federal Director of Prisons suspended him from duty on account of certain charges concerning some irregularities at the prison. A tribunal of three prison officers conducted the trial of the alleged offences for three days with legal representatives for both sides and witnesses. After twenty days the tribunal found Allen guilty on four counts and dismissed him from service. The verdict was confirmed by the Director of Prisons and by the Minister of Law and Order. Allen applied from an order of *certiorari* originally directed against the Federal Minister of Law and Order but later (because of the dissolution of the Federation) against the Attorney General for Northern Rhodesia "to bring in and quash the record of the proceedings" of the tribunal.

The High Court found firstly, that the tribunal of three men was without statutory authority, being improperly constituted. The Prisons Act, 1955, ss. 46 and 47 only authorised the appointment of one man to investigate irregularities. Consequently the court held that the tribunal "had no jurisdiction to enter upon this enquiry at all."<sup>101</sup>

Secondly, the court decided in favour of its jurisdiction to entertain an application for *certiorari* against any tribunal which conducts a trial in the territory, or, where it no longer has custody of the record, against the authority having the *de jure* and *de facto* custody.

Thirdly, although *certiorari*, will not lie in respect of a tribunal which acted not merely in excess of jurisdiction but without any colour of legal authority,<sup>102</sup> it will lie where, as in this case, a court is only improperly constituted<sup>103</sup> with consequent lack of jurisdiction.

Finally, it was held that the tribunal was not merely administrative with no duty to act judicially, but was under such a duty, since it purported to act under statutory provisions of a judicial nature. The court relied on a passage from Professor de Smith that an authority is likely to be held to act in a judicial capacity if it is designated as a tribunal or if its general characteristics or "trappings" closely resemble those of courts even when it is exercising functions of a wide discretionary nature."<sup>104</sup>

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<sup>100</sup>. [1964] S J N R 41

<sup>101</sup> At p. 45

<sup>102</sup>. de Smith: *Judicial Review of Administrative Action* (1968) 392. See also Halsbury (3rd Edn.) para. 266 p 144

<sup>103</sup>. Halsbury *op.cit* para 269 p 142; *R. (Meehan) v. Hardy* [1917] 2 I R 283.

<sup>104</sup>. *Judicial Review of Administrative Action* (1959 Edn) 289.



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